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Supreme Court of the United States

OCTOBER TERM 1923—No. 89.

SAMUEL A. MYERS and HARRY MYERS, copartners as S. A. & H. MYERS,

Petitioners,

v.

INTERNATIONAL TRUST COMPANY,

Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY.

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Petitioners,
v.
INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY.

Statement.

The Myers are defendants in an action of tort founded upon a claim that the Myers had obtained money from the International Trust Company, by reason of fraudulent representations intentionally made for the purpose of obtaining the money. The case was tried in the Superior Court, County of Suffolk, Commonwealth of Massachusetts, before a jury which rendered a verdict in favor of the International Trust Company. The Supreme Judicial Court of the Commonwealth affirmed the verdict. The Myers brought a petition for a writ of certiorari which petition was granted.

Facts.

The International Trust Company is a Bank carrying on a banking business in Boston, Massachusetts. The Myers were a partnership, origi-

nally organized in 1882 carrying on a business of manufacturing clothing in Boston. For fifteen years or more the Myers had dealt with the Bank, keeping a deposit account, borrowing money and discounting customers' notes. This continued through the year 1916, the method of borrowing being that the Myers submitted each year a statement of their financial condition for the purpose of giving information to the Bank to enable the Bank to determine what the Myers' financial condition was (Rec. p. 7). The statements from 1910 to 1915 appear in evidence in Exhibits 1 to 5 (Rec. pp. 8, 31-33).

In March, 1916, the Myers applied to the Bank for loans, and the Bank by a letter dated March 22, 1916, requested that the Myers furnish upon a form enclosed a statement of their financial condition (Exhibit 9, Rec. p. 41). (Rec. p. 10). The form had this question on it:

> "Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" (Rec. p. 20).

The Myers did not use the form but made up a statement of their own and sent that (Exhibit 6, Rec. p. 9).

The statements throughout a number of years, including Exhibits 1 to 6, were used by the Bank in determining the Myers' financial responsibility and whether their notes should be discounted. $20,000 of notes were discounted in reliance of these statements (Rec. p. 11). The last note was dated December 18, 1916 (Rec. p. 9).

In January, 1917, the Myers were petitioned into bankruptcy and immediately offered a composition, which composition was finally confirmed

and a dividend paid. The Bank proved its claim on the notes and received its dividend (Rec. p. 17).

On July 22, 1915, the Myers had made an agreement with the Commercial Investment Trust of New York (Exhibit 8) whereby the Trust agreed to advance from time to time sums of money upon assignment of accounts for merchandise sold by the Myers (Rec. p. 9). The agreement is long and complicated, but it appears that the practice was for the Myers to sell their products, send out the bills and send a duplicate of the invoice to the Trust (Rec. p. 9). The Trust then paid 78% of the amount of the invoice, although by the terms of the agreement they were required to pay 80%, the 2%, however, being retained by the Trust as a reserve fund for interest and expenses and was adjusted later (Rec. pp. 9, 17). Upon the receipt by the Myers of payment of any account which they had assigned to the Trust this payment was remitted to the Trust which paid off its advances and charges, and refunded the 20% to the Myers (Rec. p. 17).

The rate of interest which the Myers were to pay was crushing; 6% interest upon the sum advanced and in addition "a reasonable compensation for the labor, services" of the Trust of 1% of the face amount of the account for the first 15 days (Rec. p. 36), and one-half of one per cent of the first $100,000 face value of accounts assigned, and 1/30 of one per cent per day of the *face* amount of all accounts during the time while such accounts were held by the Trust (Exhibit 8 Rec. p. 41). In brief, the Myers were paying *more* than *18%* on all sums advanced. This agreement was in full force and effect during 1916 at

the time the statement (Exhibit 6) was made, and at the time the money was borrowed from the International Trust Company (Rec. p. 14), but the Myers kept the fact that there was such an agreement and the contents of it entirely concealed from the Bank (Rec. p. 9), and permitted the Bank to advance the $20,000 in ignorance of the fact that the Myers had "hocked" their accounts receivable.

The statement (Exhibit 6) contained no word of this assignment. It set out that the Myers owned accounts receivable on January 1, 1916, of $58,425.06, although the truth of the matter was that on that date the Myers had assigned some $27,000. of these accounts (Rec. p. 14). In short, the statement set forth that among the assets were accounts receivable drawing interest, while the truth of the matter was that of those accounts receivable $27,000 were sold and were costing the Myers more than 18% in interest. On the days the statement was given to the Bank, March 27, 1916, this $27,000. had risen to $46,441.13, so that the accounts receivable owned by them on the 27th of March were actually less than one-quarter of what the statement showed (Rec. p. 14).

To balance the statement the Myers included in the accounts payable of $76,102.72, the $27,000. of assigned accounts (Rec. p. 18), although accounts payable have for the usual and ordinary meaning sums owed for merchandise bought, labor and so forth (Rec. pp. 10, 15), and not money borrowed at 18% interest (Rec. p. 15) as the Myers well knew. The normal rate of interest was 5½% and 6% at that time (Rec. p. 15).

Under such circumstances the Bank brought in the State Court *an action of tort* to recover the

damage it had suffered by reason of the fraud and deceit (Rec. p. 27). The defendants denied the fraud, and in addition set up that the debt was discharged by reason of the composition in bankruptcy and, further, that the Bank had objected to the confirmation of the composition on the ground of fraud, and that the confirmation of the composition in the Bankruptcy Court was *res adjudicata* on the question of fraud (Rec. p. 29).

It should be noted that the Bank brought a *tort* action to recover damages by reason of the fraud perpetrated upon it and *not* an action in *contract* to recover on the notes.

The petitioners urge that the Massachusetts Court has not given full faith and credit to a judgment of the United States Courts in that the State Court failed to hold that this obligation for which suit was brought was barred by the confirmation of the composition.

This contention is nothing more than the determination of the question of what claims are barred by a discharge in bankruptcy.

I.

The right of the bank to maintain an action for deceit and misrepresentations was not a provable claim in bankruptcy and hence was not discharged by the confirmation of the composition.

At the time the International Trust Company made the advances it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created

by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank to pay money upon misrepresentations intentionally made.

The Bankruptcy Act (U. S. Comp. Stats., Sec. 9598), recognizes these two distinct causes of action and discharges the debtor from his liability on the contract and denies him the discharge from liability for deceit.

Section 14c provides that the confirmation of a composition discharges debts other than those not affected by a discharge.

Section 14b requires the discharge of the debtor unless he has "* * * (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

Section 17, as amended by Act February 5, 1903, c. 487, sec. 5, and Act March 2, 1917, c. 153, provides that a discharge releases a bankrupt from his provable debts except such as "* * * (2) are liabilities for obtaining property by false pretenses or false representations * * *"

Section 63 defines "provable debts," and the definition does not include actions of tort for false representations.

The meaning of the word "false" as used in these sections of the Bankruptcy Act is that the statement must be not only untrue, but also untrue with an intention to deceive.

No question is raised as to the instruction to the jury by the Trial Court defining the word "false" (Rec. p. 21. Requests 3, 4, and 5. Charge Rec. pp. 22, 24, 25.)

The Bank proved its claim on the notes in the Bankruptcy proceedings.

It did *not* prove its right to recover in tort for deceit and misrepresentation.

Such a claim is not provable.

In *Schall* v. *Camors,* 251 U. S., 239, commercial paper was sold by a partnership by means of false representations. Both the partnership and individual partners were petitioned into bankruptcy. The creditor proved his claim on the notes against the partnership estate. He also proved against the individual estates of the partners a claim for damages suffered by reason of the misrepresentation. Upon the petition of the trustee in bankruptcy the claim against the individual estates was rejected on the ground that this claim was one in tort and hence was not provable.

In *Talcott* v. *Friend,* 179 Fed., 676, (C. C. A. 7th), affirmed 228 U. S., 27, the debtor obtained credit for merchandise upon a statement which was false. It was held that the creditor could prove his claim in contract in the bankruptcy proceedings and also maintain an action after the bankruptcy proceedings to recover damages for the injury suffered by reason of the misrepresentation. On page 680 the Court said:

> "If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick; and if the claimant proved the theft or force or trick to support the legal fiction of a contract—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort would be held to be the basis

> of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with a contract's existence is necessary to the contract enforcement.
>
> "We conclude, therefore, that the prosecution of the claim in bankruptcy was not a bar to this action for deceit."

And again, at page 682:

> "The cause of action for deceit, not having been reduced to 'a fixed liability as evidenced by a judgment,' was not a 'provable debt' (section 63 of the act; 1 Remington on Bankruptcy, pp. 376, 424) and therefore was not extinguished by the discharge."

Speaking of the principle urged by the respondent in the foot note to the report of this decision in 43 L. R. A. N. S. 649, it is said:

> "The questions stated may now be regarded as conclusively answered by the Supreme Court of the United States."

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud.

Standard Sewing Machine Company v. *Kattell*, 132 N. Y. App. Div. 539;
In re Menzin, 238 Fed., 773, (C. C. A. 2nd);
Zimmern v. *Blount*, 238 Fed., 740 (C. C. A. 5th);
In re Groodzinsky, 248 Fed., 753 (D. C. Ga.);
Forsyth v. *Vehmeyer*, 177 U. S. 177;
Crawford v. *Burke*, 195 U. S. 176, 178.

In *Frey* v. *Torrey,* 70 N. Y., App. Div. 166, aff'd in 175 N. Y. 501, the fact that the plaintiff had proved his claim in bankruptcy on a contract was held to be no bar to maintaining an action in the State Court for deceit.

The debt is expressly excepted from the operation of the discharge by §17 (2).

The present case is not one where the plaintiff may treat his cause of action as one in assumpsit, electing whether he will treat the fraud as a quasi-contract and waive the fraud, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action.

Crawford v. *Burke,* 195 U. S., 176, has no application to the present case. It is a decision on the Bankruptcy Act before the Amendments of 1903. It holds merely that the Act as it then existed excepts from the operation of the discharge only judgments founded on a fraud and not claims based on fraud. The Act has since been amended to enlarge the scope of debts not discharged. Further, the cause of action was based on conversion of stock, so that the creditor had a right to elect whether he would sue in contract or in tort.

Tindle v. *Birkett,* 205 U. S., 183, is also a judicial determination of the statute before amendment, and the Court expressly states that *Crawford* v. *Burke* governs that decision.

Kreitlein v. *Ferger,* 238 U. S., 21, is no authority that the claim now before the Court was a provable claim. At page 27 it is said:

> "On the part of Ferger it is said that this suit is on a judgment for $300 rendered in an action not 'founded upon a contract express or implied—and it seems to have been claimed that the judgment was not a provable debt

> within the meaning of Section 63 (a. 4) of the Bankruptcy Act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein *had not made any fraudulent concealment or misrepresentation as to his financial condition.* Besides the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulent conversion instead of assumpsit for a balance due on open account. *Crawford* v. *Burke,* 195 U. S. 176, 193." (Italics are counsel's.)

The petitioners fail to recognize the fact that the Bank has these separate rights and argue that there was but one claim which was proved and dividends in composition received on it. Hence the argument is that under Sec. 17 (2) the claim was barred unless the petitioners' statements were false, and the judgment of the Bankruptcy Court was that it was not false. As Sec. 17 (2) applies only to "provable" debts and Sec. 63 does not in its definitions of "provable debts" include a debt arising by reason of false representations, the decision of the Bankruptcy Court on the statement has no bearing on whether the claim was provable and hence barred by the discharge.

II.

The decision of the United States District Court in bankruptcy in confirming the composition was not *res judicata* upon the question of fraud.

The Trial Court properly excluded the record in the bankruptcy proceedings.

In the course of the trial it appeared that shortly after the making of the loans in question the Myers went into bankruptcy and in the course of the proceedings offered the composition, which was confirmed, and the Bank proved the notes and received its payment thereon in this composition.

The Myers offered in evidence the record in the proceedings in the United States District Court for the district of Massachusetts in the case of *In re Samuel A. Myers et al, Bankrupts,* including the record on appeal to the Circuit Court of Appeals for the First Circuit and the mandate of the Circuit Court of Appeals sustaining the District Court in confirming the composition.

This record, the petitioners contend, constitute an estoppel against the bank, which prevents the bank from maintaining its action in the state court to recover the damages suffered by reason of the false statement.

Section 12-d of the Bankruptcy Act requires the confirmation of a composition, provided the alleged bankrupt has not been guilty of any acts which will bar a discharge, and Section 14-b-3 refuses the discharge if the bankrupt has obtained money or property on credit upon a materially

false statement in writing made to "any person or his representative" for the purpose of obtaining credit.

Any creditor may object to the confirmation of the composition irrespective of whether the false statement was made to him or to another creditor.

In re Miller, 192 Fed. 730, 733 (D. C., N. D., Iowa);
Talcott v. *Friend,* 179 Fed., 676, 681 (C. C. A. 7th);
In re Kretz, 212 Fed., 784, 786 (D. C., W. D., Wash.)

The jury has found after proper instruction from the trial court that the statement was intentionally false within the definition of the Federal cases construing the Bankruptcy Act (Rec. pp. 24, 25, 27).

The petitioners have argued that the Bank had the option of remaining silent in the Bankruptcy Court as to the fraud and later avoiding the effect of the discharge by showing that the petitioners' liability was for obtaining property by false representations, or of trying out the issue of fraud in objecting to the discharge in the Bankruptcy Court.

This argument is clearly unsound and results from confusing the nature of the Bank's rights. It assumes that the Bank had only one claim and that the assertion of that claim in the Bankruptcy Court eliminated the right to maintain an action for fraud after the granting of the discharge. Further, it assumes that the Bank had

the right to avoid the discharge in a subsequent suit on the notes, on the ground that it was a provable debt and a liability for obtaining property by false pretenses under §17 (2). The Bank, as stated before, had two rights—contract on the notes and tort for fraud. The first was provable. The second was not. If the Bank had merely the one right which allowed it to go into the Bankruptcy Court, it had a provable claim which was followed by the discharge, but under the statute the Bankruptcy Court never had and could not have before it the claim founded on the tort.

Further, the damages in the tort action could not be determined until the loss suffered by reason of the tort was fixed by the dividend received in the Bankruptcy proceedings.

There was no such election and waiver as the petitioners argue.

> *Friend* v. *Talcott*, 228 U. S., 27, at pp. 37-38.

Neither is it a case of one wrong with an election of remedies.

The case of *United States* v. *Oregon Lumber Co.*, 260 U. S. 290 (Advance Sheets) shows clearly the distinction between the present case and one where an election bars a second suit. In the Oregon Lumber Company case the sale of lands was voidable and the Government had suffered one wrong, namely, being induced by fraud to convey lands. It could either disaffirm the sale and recover the lands or seek damages for the fraud, that is, disavow the contract or affirm it. After attempting to disavow the contract it could not then affirm it.

In the present case the proving of the notes was the affirmation of the contract and the bring-

ing of suit in tort was a second affirmation and seeking damages for the injury caused by reason of the fraud. The right to object to the discharge arose out of the right to prove the notes and was entirely incidental thereto.

Nor can the doctrine of estoppel have any application.

The parties in the Bankruptcy proceeding are not the same as the parties in this suit. It was the bankrupt estate against the bankrupt and not one individual creditor against the bankrupt.

In *Troxell* v. *D., L. & W. R. R.*, 227 U. S. 434, 443, a suit by a widow personally was held to be a suit entirely different from one brought by the widow as administratrix.

Bates v. *Bodie*, 245 U. S. 520, has no application. The parties were the same, the issue of divorce was the same. The determination of alimony was based on the total value of the husband's property both in Nebraska and Arkansas. Hence the issue of the value of the property in Nebraska had been raised and determined.

Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, holds there was no estoppel because the parties were not the same. The Company was not a party or privy to the former suit.

The question at issue is not the same. The sole question in the bankruptcy proceedings was whether the debtor should be dicharged from his provable debts, not whether any particular debt was discharged. In the present case the sole question is whether the Meyers had obtained money or credit from the plaintiff upon an intentionally false statement, and if they had, this claim was not a provable debt and was not barred by the discharge. The cases cited above hold that it was not a provable debt.

The Bankruptcy Act itself brings the two rights out clearly. Section 14-b-3 requires that the false statement shall be in writing, but Section 17-a provides that a discharge shall not release the bankrupt from liability for obtaining money by false representations even though the statement is not in writing. This shows clearly that the statute contemplates that certain acts shall constitute a bar to the discharge, thus continuing the liability of the bankrupt for provable debts, but that certain other acts shall prevent the release of the bankrupt from liability arising from them, although such acts alone are not a bar to the discharge.

Friend v. *Talcott*, 228 U. S. 27, is decisive. The facts are almost identical with the facts in the present case. A partnership, consisting of Friend and some others, was adjudicated bankrupt; the bankrupts offered a composition; Talcott, a creditor whose claim in contract had been allowed, objected to the composition on the ground that the bankrupts had obtained from him credit by means of false reports as to the financial conditions of the firm. The objections were overruled on the ground that the statement was made to a commercial agency, and the composition was confirmed. Later Talcott brought suit to recover the damages suffered by reason of the false statement, relying on the same deceit set out in his objections to the composition and the damages sought were the difference between the contract price and the amount which Talcott had received in the composition. The defendants in addition to the general issue set up *res judicata*.

The Court held that the action could be maintained and that the confirmation of the composi-

tion was not *res judicata*. At page 40 the Court said:

> "While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge.' * * *
>
> "Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford

no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

See *Talcott* v. *Friend*, 179 Fed. 676, 681.

The *Talcott* case is not distinguishable. The fact that the representation was made through a commercial agency, and that the Bankruptcy Court in confirming the discharge did not pass on the question of whether Friend had obtained credit by misrepresentation, does not make any difference. Both the Circuit Court of Appeals and the Supreme Court considered this argument and rejected it.

Even conceding the defendants' argument that the case of *Friend* v. *Talcott* might have been decided on a narrow ground, the fact remains that the Court did establish exactly the principles for which the respondent contends in this case, and the respondent submits that the Trial Court ruled properly in following this decision of this Court.

The Circuit Court of Appeals for the Second Circuit has followed the *Talcott* case.

In re Menzin, 238 Fed. 773 (C. C. A. 2nd). In that case there was an order by the District Court staying petitioners from proceeding under their specifications filed in opposition to the bankrupts' discharge, unless they discontinued their action brought in the State Court. The debtor was adjudicated bankrupt and the creditor proved his claim for goods bought. The creditor then brought suit in the State Court to recover damages by reason of the bankrupt having obtained the goods in question on credit by fraudulent representations. The Court held that such a suit in the State Court could be maintained in spite of the fact that a claim in contract had been allowed in the bankruptcy proceeding.

At page 774 the Court said:

> "(3) We are quite clear that the petitioners may proceed with their suit in the state court in tort notwithstanding that they first proved their claims in bankruptcy on contract. In *Friend* v. *Talcott,* 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, the Supreme Court held that a creditor who had unsuccessfully opposed a composition and discharge in bankruptcy, and who had accepted his dividend thereunder, might still sue for the balance of his claim in the state court, on the ground that the indebtedness was fraudulently contracted, and therefore excepted by the act from the operation of the discharge."

The rule of the *Talcott* case which the Bank urges is the same as already given by the Federal Courts.

In *Pell* v. *McCabe,* 256 Fed. 512 (C. C. A. 2d), at page 517, it is said:

"*Friend* v. *Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718. In the case cited the Court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the Court also held that the granting of the discharge was not *res judicata* of the claim for the balance of the debt."

See also *in re Groodzinsky*, 248 Fed. 753, 754, 755;
Corpus, Juris Bankruptcy, p. 400;
Collier Bankruptcy, 1921 Ed. p. 406;
Remington Bankruptcy, 2nd Ed., p. 2493, § 2750¾;
Foster Federal Practice, 5th Ed., Vol. II, pp. 2254, 2256.

III.

There was ample evidence from which the jury was entitled to find that the Myers obtained money with intention to deceive by means of a false statement.

The petitioners do not claim that there was error in the instructions which were given to the jury on this question or that the Trial Court or that the Supreme Judicial Court did not follow the United States Courts in the definition of the fraud which the Bank must prove in order to

recover. (Rec. pp. 22, 24-25. Requests for Instructions No. 3, 4, 5 and 6, at Rec. p. 25.)

It was claimed by the Meyers that the statement was not false.

The Bank alleged that it had been deceived by reason of the Myers failing to give information as to a material change in the method of doing business; by the Myers concealing the fact that the Myers had assigned accounts receivable; by the Myers giving a statement which was in itself false, not only by its failure to set out a true, accurate and complete statement of their financial condition, but also by having absolutely false entries in the statement itself.

The Trial Court held that there was sufficient evidence upon which the jury might find that the statement was false. The Supreme Judicial Court was satisfied that the Trial Court was correct (Rec. p. 45).

The Bank in its letter of March 22, 1916 (Exh. 9) asked the Myers "to send us on the enclosed form statement of your financial condition". The form enclosed was not used by the Myers, but instead Exhibit 6 was sent.

The statement, Exhibit 6, was false in four particulars.

(A) It stated that the bankrupts owned accounts receivable for merchandise sold of $58,426.06, which in fact they did not own any such sum of such accounts. Samuel Myers testified (Rec. p. 10):

> "Accounts receivable meant accounts due us from customers for garments and clothing which we had sold and shipped to them."

Glass, the bookkeeper in charge of the books, testified (Rec. p. 14):

> "At the time the statement of March 27th, 1916, Exhibit 6, was made, I think something like $27,000 of accounts receivable had been assigned, as of January 1, 1916. The books show that on March 27th, I should say we had assigned accounts to the extent of $46,441.13".

Samuel Myers testified (Rec. p. 9):

> "It (Item of accounts receivable) also contained all the accounts which we had assigned. It included the notes which we had assigned to the Investment Trust. The general practice in dealing with this Investment Trust was that we ship merchandise, invoice it, take certain accounts, and send them a duplicate invoice, and they would loan us 80% on that invoice."

(B) The statement included in the sum owed for merchandise, as accounts payable, $27,000. which was in fact owed for borrowed money at more than 18% interest.

Myers testified (Rec. p. 10):

> "Accounts payable meant accounts owed by us for merchandise which we had bought."

Glass testified (Rec. p. 15) that the accounts payable meant money owed for services, merchandise, and that the generally accepted term "accounts payable" could not be interpreted according to the ethics of accountants as including money which they had borrowed. He further testified (Rec. p. 15):

> "The money received from these assigned accounts was not an obligation to pay for merchandise."

The fact was that this item included the money which the Myers owed the Commercial Investment Trust for money advanced by that Trust upon which they were paying more than 18% interest, although, as Myers testified (Rec. p. 10):

> "The item, notes payable, in the statement Exhibit 6 represents money borrowed whether we gave a note or not."

(C) The statement set out that the loans were $59,713.12 while in fact they were $86,613.12; $26,900 having been omitted.

The item for notes payable represented that the only money borrowed was included in that item. In short, the statement represented that on January 1, 1916, the Myers owned $27,000 of quick assets and on the 27th of March, 1916, $46,441.13, while as a matter of fact they did not. It concealed entirely the fact that the Myers had borrowed $26,900 on which they were paying more than 18% interest.

(D) The statement was false in concealing the assignment of accounts and the material change in the method of conducting the business.

The Myers had been dealing with the International Trust Company for fifteen years or more and had been discounting notes and borrowing money from time to time. They had given a financial statement each year (Rec. p. 7). In 1903 they were asked if any accounts were assigned (Rec. p. 10). When they made this statement, Exhibit 6, they were asked in the form which came with the letter, Exhibit 9, "Are all bad or doubtful assets included in above statement? Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" (Rec. p. 20.) In 1903 they answered

that they had not assigned accounts (Rec. p. 10) and in 1916, by their failure to use the form sent by the Bank they represented to the Bank that the answer to both of these questions was in the negative. They did not disclose to the Bank the complete change in the method of financing their business. Further, Myers testified (Rec. p. 9):

> "When I gave the notes, Exhibit 7, to the Trust Company, I did not at any time tell them of this agreement with the Commercial Investment Trust, or that we were putting up our accounts receivable for money loaned to us."

In other words, they concealed the fact that the only quick assets which appeared on the statement had been turned over to the Commercial Investment Trust and were not available to creditors.

As stated by Braley, J., in the opinion in this case (Rec. p. 45):

> "The concealment of material facts with intention to mislead and defraud stands no better than the affirmation of a material misrepresentation. We refer only to a few cases sustaining what has been said on this branch of the case. *Safford* v. *Grout*, 130 Mass. 20; *Stewart* v. *Joyce*, 201 Mass. 301, 310, 311 and cases there cited. *Robinson* v. *Richards*, 209 Mass. 295; *Harvey* v. *Squire*, 217 Mass. 411, 416; *Warfield* v. *Wood*, 14 Wend. 126; *Stubly* v. *Peachboard*, 68 Mich. 49."

Hough, J., in *In re Brener*, 166 Fed. 930, at 931, when dealing with a statement from which borrowings had been omitted said:

> "The suppression of all indebtedness for borrowed money is, I think a particularly flagrant form of material falsity, first because it is a suppression of truth especially calculated to prevent further inquiry, and second, because its omission is the omission

> of something particularly and always present in the mind of the debtor. It cannot be inadvertent. It must be deliberate."

The representations were material. Jewett, the officer of the Bank who passed upon the question of loans to be made to the Myers, testified:

> "These (Exhibits 1 to 6) are the statements I used in giving credit to the Myers. * * * Prior to October, 1916, I did not have any conversation with them (Myers) as to the discounting of notes. When I discounted the notes in question, I relied upon the signed statement on file to determine whether credit should be given to the Myers. I did not limit it to one statement but relied on those throughout a number of years. When I passed on the statements I relied on the accounts receivable as having the ordinary and usual meaning in business (Rec. p. 11).
>
> * * *At the time the notes were presented I had no information that the Myers had assigned their accounts receivable to the Commercial Investment Trust. The Myers did not disclose in any form any information that they had assigned their accounts receivable. The statement in Exhibit 6 did not show that certain accounts receivable had been assigned" (Rec. p. 12).

He further testified that he did not know the Myers were paying at the rate of 16% to 18% for money borrowed, otherwise

> "We would not have discounted those notes. I have had experience in discounting and banking, and my experience has been that when persons pay 16% to 18% for money they are in a bad condition" (Rec. p. 12)

He continued that if he had known he would not have advanced a dollar (Rec. p. 12).

In July, 1915, the Myers had made this agreement with the Commercial Investment Trust and proceeded to assign accounts from time to time, always in increasing amounts.

There can be no question that the statement was false, not only as set forth above but also in the amount of the "net capital" of $83,510.33, for with such a capital it would have been entirely unnecessary to have inaugurated the system of assigning the accounts. Further, it completely failed to set out a change in the method of doing business and the mere fact of it being delivered to the Trust Company in silence led the Trust Company to believe that the Myers were carrying on their business in the old reliable and honest way.

The Myers urge that there was no evidence of intention to deceive.

The Myers intended to borrow money on this false statement and did borrow $20,000. on it from the International Trust Company.

Samuel Myers testified:

> "I intended that the International Trust Company rely on it (the statement) as being accurate and true. I gave it (the statement) to them so that they would know our condition" (Rec. p. 11).

Glass, the bookkeeper, testified:

> "When this statement, Exhibit 6, was made, we intended that whoever saw it should rely on it, and that they should take it just as it was made out" (Rec. p. 18).

Samuel Myers knew that these statements were given to the Bank to enable the Bank to find out what their financial condition was (Rec. p. 8). The form used in 1903 and that sent with the letter of March 27, 1916, contained direct ques-

tions as to whether the assets were pledged or accounts assigned. He knew that the form included in Exhibit 9 contained a similar question. He knew the meaning of accounts receivable and he knew that the item of accounts receivable in his statement (Exhibit 6) included all which he had assigned (Rec. p. 9). He testified how he conducted his business with the Commercial Investment Trust. He knew the terms of that contract including the fact that he was paying 18% interest. He knew of the various meanings of the terms in the statement and of the false entries. He knew of the change in his method of doing business. With all this knowledge he remained silent and permitted the Trust Company to lend him money.

Nor can he shelter behind the testimony of his bookkeeper, Glass. Glass knew the terms of the Commercial Investment Trust agreement (Rec. p. 14); he knew the meaning of the accounts payable and accounts receivable; he knew that $27,000 worth of accounts were assigned, and that the amount of these assigned accounts increased during the year 1916 to over $100,000 (Rec. pp. 14 and 18); he knew that the item accounts payable did not disclose interest of 18% (Rec. p. 15). His testimony can leave no question that he was thoroughly familiar with the entire situation and with that form before him prepared the statement to be sent to the International Trust Company under the direction of Samuel Myers.

Any person charged with intentional fraud will stoutly deny that he ever intended to deceive, and the intention can be found only from what happened. Ample circumstances were put in evidence to clearly establish the deliberate intention to deceive. It is not a question of the disbelief of the

jury creating affirmative evidence. The evidence was there.

The Court will hesitate to review the findings of a jury which saw the witnesses and heard the manner in which these witnesses testified, or to set aside the rulings of the Trial Justice on questions of fact. The Supreme Judicial Court found in the case ample evidence from which the jury could find intention to deceive within the definition given by the Trial Court.

IV.

The trial court committed no errors in admitting evidence.

The petitioners urge that the Trial Court committed error in admitting evidence which the plaintiff offered.

The Supreme Judicial Court, however, has found no error and the Bank does not intend to burden the Court by an extensive argument of these questions.

(a) The Bank offered statements submitted by the defendants from January 1, 1910, to February 4, 1914 (Exhs. 1 to 5) and the petitioners objected (Rec. pp. 7, 8).

These statements were offered as showing a course of dealing prior to 1916, and as a part of a continuing representation down to the time when the false statement, Exhibit 6, was submitted.

The offer was also preliminary to examination of the Vice President of the Bank who testified

that in determining whether the loans of $20,000 from October, 1916, to December, 1916, should be made, he relied on all previous statements (Rec. p. 11). Further, the statements were admissible as part of the method by which the petitioners had concealed and suppressed material facts in respect to Exhibit 6.

The change by the petitioners in their method of financing their business was a material fact which could be proved only by evidence of what had been done before, namely, Exhibits 1 to 5.

(b) Henry L. Jewett, the officer at the Bank, who passed on the financial condition of the Myers, was asked whether or not the Myers had informed him that they were paying 16 to 18 per cent interest for money (Rec. p. 12). The petitioners objected to the question.

It was material to show that the Myers had not informed the Bank of the rate of interest or of the assignment of the accounts and consequently the financial condition. It was also material that the Bank had no knowledge of the falsity of the statement when it advanced the money on the strength of the statement. The question is clearly one to establish the knowledge which the Bank had.

(c) The petitioners also objected to Jewett being asked whether he would have advanced the money if he had known that the petitioners were paying 16 to 18 per cent interest, or that an agreement like the one in question had been made, and further, they objected to the question of whether Jewett had been misled in his opinion of the financial condition, by reason of the failure of the statement Exhibit 6, to disclose the facts relating to the assignment (Rec. pp. 12 and 13).

The operation of Jewett's mind was for the consideration of the jury and on that subject he was the only competent witness.

Toole v. *Crafts*, 193 Mass., 110, 112;
Anaster v. *Koliopoulos*, 222 Mass., 267, and cases therein cited.
Cyc., Vol. 20, p. 117.

(d) The petitioners objected to the admission of the blank form at the close of the Bank's case.

The letter of March 22, 1916, Exhibit 9, referred to a form enclosed. The form was not produced when the letter was admitted. The Bank objected to the admission of the letter without the production of the form, and upon the Court suggesting that the Bank produce the one in use at the date of the letter, and that that one be put in evidence, the objection was withdrawn. The petitioners acquiesced in this suggestion and had the letter marked as an exhibit (Rec. p. 10).

At the close of the Bank's case the form in use in March, 1916, was offered in evidence and admitted over the petitioners' objection (Rec. p. 19).

It is respectfully submitted that the petitioners, by acquiescing in the suggestion of the Court, induced the Bank to change its position and withdraw its objection to the admission of Exhibit 9. They should not now be heard in repudiation of their action.

(e) The petitioners objected to the allowance of interest by the jury from the date of the writ (Rec. p. 26).

There was no error in permitting the jury to compute such interest.

Cochran v. *Boston*, 211 Mass., 171, 172.
New York Bank Note Co. v. *Kidder Press Mfg. Co.*, 192 Mass., 391, 406.
Peabody v. *New York, New Haven & Hartford*, 187 Mass., 489.
Frazer v. *Bigelow Carpet Co.*, 141 Mass., 126.

Respectfully submitted,

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Supplementary.

The respondent not having been served with a copy of the petitioners brief until September 21st, was not aware of the points upon which the petitioners intended to rely. As a consequence the third and fourth points in the respondent's brief are superfluous.

In the view of the respondent the finding of the Referee as to the truth or falsity of this statement is immaterial, as that finding creates no estoppel and is not *res judicata* on the question of falsity, but in view of the persistency with which the petitioners claim that the Referee found that the statement was not false, the respondent begs leave to refer the Court to the exact finding of the Referee at page 58; "When the financial statement showing the condition of the bankrupts above referred to was taken from their books it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time, and kept by an experienced, competent bookkeeper * * *

"I therefore find and so report that according to the method of bookeeping employed by the alleged bankrupts the amount of the accounts receivable January 1, 1916, was correctly set forth in said statement."

This is merely a finding that the statement was a correct transcript from the books—it is not a finding that the statement set forth the true and accurate financial condition of the bankrupts upon which one could rely in lending them money.

It is respectfully submitted that the books were false, and that a statement containing the same falsity as the books does not get purged of the misrepresentation as to the financial condition of the bankrupts merely because it is a copy of such false books.

The Referee made no finding whatever as to the concealment of the making of the agreement with the Commercial Trust or of the fact that accounts receivable had been assigned.